Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANK ALEXANDER LEWIS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Second Court Of Appeals At Fort Worth, Texas

PETITION FOR WRIT OF CERTIORARI

DANNY D. BURNS
Counsel of Record
115 North Henderson Street
Fort Worth, Texas 76102-1940
817/870-1544 FAX 870-1589
State Bar No. 03443800

Attorney for Petitioner Lewis

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ISSUES PRESENTED

1. DOES THE PROHIBITION AGAINST DOUBLE JEOPARDY PREVENT THE STATE FROM PROSECUTING THE DEFENDANT A SECOND TIME FOR THE SAME CONDUCT WHEN THE ACT, THE INTENT, AND THE SUBSTANCE OF THE OFFENSE HAD BEEN PREVIOUSLY PROSECUTED IN A LESSER INCLUDED OFFENSE BUT ONLY THE NAME OF THE INJURED PARTY ALLEGED HAD BEEN CHANGED?

2. IS THE TEXAS STALKING STATUTE SO VAGUE THAT ITS ENFORCEMENT IMPINGES UPON PROTECTED FIRST AMENDMENT RIGHTS?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for FRANK ALEXANDER LEWIS certifies that this is a civil case (a writ of habeas corpus) and that the persons having an interest in the outcome of this case are the Appellee, the United States of America and the Appellants, co-defendants and counsel:

JUDGES:

Hon. Everett Young
297th Judicial District Court
401 W. Belknap
5th Floor
Fort Worth, Texas 76196

PETITIONER:

Frank Alexander Lewis

TRIAL COUNSEL:

Hon. Fred Cummings, and Rebecca Denham
Prosecuting Attorneys
Tarrant County District Attorney's Office
401 West Belknap Street
Fort Worth, Texas 76196

Hon. Danny D. Burns
115 North Henderson Street
Fort Worth, Texas 76102

APPELLATE COUNSEL:

Tim Curry, District Attorney
Hon. Charles M. Mallin & Edward L. Wilkinson
Assistant District Attorneys, Appellate Section
401 West Belknap Street
Fort Worth, Texas 76196-0201

CERTIFICATE OF INTERESTED PERSONS – Continued

Danny D. Burns, Appellate Counsel for Defense
115 North Henderson Street
Fort Worth, Texas 76102-1940

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final decision of the Texas Second Court of Appeals in this case. The State Court Petition for Discretionary Review was denied by a post-card notification on February 12, 2003.

OPINIONS BELOW

The Texas Second Court of Appeals issued its first unpublished opinion in this case on June 27, 2002 in which the Court found a double jeopardy violation but found it to be harmless beyond a reasonable doubt. A timely filed Motions for Rehearing from both the State and the Defense were overruled on August 1, 2002. Both the State and the Defense filed Petitions for Discretionary Review to the Texas Court of Criminal Appeals. The Texas Second Court of Appeals exercised its discretion under Rule 50 of the Texas Rules of Appellate Procedure, withdrew the June 27, 2002 opinion and issued an opinion finding no double jeopardy. The Texas Second Court of Appeals issued the second, now published opinion on September 9, 2002, with a dissenting opinion by Justice Dauphinot. No Motion for Rehearing was filed on the second opinion. The Petitioner filed a timely Petition for Discretionary Review to the Texas Court of Criminal Appeals in Austin, Texas. On February 12, 2003, the Texas Court of Criminal Appeals denied by a postcard notification the application for a Petition for Discretionary

Review. This Application for Writ of Certiorari in a criminal case is due to be filed on or before May 12, 2003.

JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a court of appeals in which a decision could be had pursuant to 28 U.S.C. §1257 and 28 U.S.C. §2104.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Texas stalking statute is §42.072 of the Texas Penal Code:

> (a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct, including following the other person, that:
>
> (1) the actor knows or reasonably believes the other person will regard as threatening:
>
> (A) bodily injury or death for the other person;
>
> (B) bodily injury or death for a member of the other person's family or household; or

(C) that an offense will be committed against the other person's property;

(2) causes the other person or a member of the other person's family or household to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property; and

(3) would cause a reasonable person to fear:

(A) bodily injury or death for himself or herself;

(B) bodily injury or death for a member of the person's family or household, or

(C) that an offense will be committed against the other person's property;

(b) an offense under this section is a Class A misdemeanor, except that the offense is a felony of the third degree if the actor has previously been convicted under this section.

(c) In this section, "family," "household," and "member of a household" have the meanings assigned by Chapter 71, Family Code.

The Texas harassment statute is §42.07 of the Texas Penal Code:

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

(1) initiates communication by telephone or in writing and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, by telephone or in writing, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family, or his property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection, or

(6) knowingly permits a telephone under his control to be used by a person to commit an offense under this section.

(b) For purposes of Subsection (a)(1), "obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function. In this section, "family" has the meaning assigned by Section 71.003, Family Code.

(c) An offense under this section is a Class B misdemeanor.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

The Petitioner Mr. Frank Alexander Lewis was indicted for the offense of Stalking with a prior misdemeanor offense alleged for enhancement to a third degree felony. The offense was alleged to have occurred on or about November 23, 1999, December 18, 1999, June 25, 2000, July 4, 2000, and July 6, 2000, all pursuant to the same scheme or course of conduct. (TR., p. 3-5)

The Defendant entered a plea of not guilty. The jury trial was held in the 297th Judicial District Court of Tarrant County, Texas. (TR., p. 4) The Petitioner Mr. Frank Alexander Lewis was found guilty as charged and the Jury assessed punishment at ten (10) years in the Institutional Division of the Texas Department of Criminal Justice and a ten thousand dollar fine, the maximum sentence for a third degree felony. (Appendix, Judgment and Sentence) Petitioner Mr. Frank Alexander Lewis timely filed his notice of appeal.

B. Statement of Facts.

Mr. Lewis and Susan Charles first met sometime around March of 1993. (R., Vol. 4, p. 150) The first date did not turn out very well since an old girlfriend of Mr. Lewis happened to work at the Outback Steakhouse where they went to eat. (R., Vol. 4, p. 151) They saw one another on and off for the next couple of years. (R., Vol. 4, p. 153) During their relationship they became intimate. (R., Vol. 4, p. 155) Susan Charles testified that she tried to break it off with Frank Lewis around 1994 or 1995 and she stopped going out with her friends in order to avoid contact with Frank Lewis. (R., Vol. 4, p. 154-155) She testified that she

had to change her telephone number over 25 times between 1994 and 1995. (R., Vol. 4, p. 160-161) She admitted however, to telling Frank Lewis in a 1998 telephone conversation that she was not saying that their relationship was over. (R., Vol. 5, p. 64) She further admitted to calling Frank Lewis so often in 1995 or 1996 that he had to have a block placed on his phone to keep her from calling him at his house. (R., Vol. 5, p. 65) Mr. Frank Lewis went out of State on a probation case and contact stopped between June and November, 1999. (R., Vol. 4, p. 168) In 1999 Susan Charles started receiving telephone calls from Frank Lewis again. (R., Vol. 4, p. 164-165) When she was working at Auto Trader's she started getting messages on her voice mail. (R., Vol. 4, p. 166) When she turned off her voice mail, she alleged that Frank Lewis would leave pornographic messages on other employees' phones. (R., Vol. 4, p. 166) She never produced another employee or explained how he would have gotten their numbers. She testified that she was afraid that he would now hurt her because last time he got caught. (R., Vol. 4, p. 168) She testified that his messages left on her phones ranged from "I love you" to "I'm going to make you pay, I'm going to hurt you, I'm going to kill you." (R., Vol. 4, p. 169) She listened in January, 2000 to a tape recording of Frank's voice played for her by a police detective from the calls Mr. Reed had recorded in December, 1999. (R., Vol. 4, p. 104-105; 182-184) The phone calls were placed to a Mr. Robert Reed at phone number 817-467-5432. (R., Vol. 4, p. 33-39) Mr. Reed taped the calls and turned them over to a detective in order to file telephone harassment against Mr. Lewis. (R., Vol. 4, p. 38-39) These are the same telephone calls for which Mr. Lewis was convicted of telephone harassment against Mr. Reed in cause number 0774806. (R., Vol. 4, p. 39, 51) From January to May of 2000 the

calls were not as bad; she was getting used to them. (R., Vol. 5, p. 13-15) She received some voice mails at the end of June, 2000 at her office. (R., Vol. 5, p. 14-15) On one of those tapes she heard Frank Lewis' voice say "you're going to be done, bitch" and this made her scared. (R., Vol. 5, p. 18-19) Then on July 4, 2000, she received a voice mail saying that she had messed up his life and now she was going to have to spend the rest of her life with him. (R., Vol. 5, p. 22)

The Defendant testified to repeated calls from Susan Charles and to her exaggerations. For example, she reported to the police that Mr. Frank Lewis had threatened to sexually molest her father when he had told her "fuck her father." (R., Vol. 8, p. 59) Susan Charles called his house starting in 1997 and on hundreds of times and would usually hang up when he or his answering machine answered. (R., Vol. 8, p. 59-60) In the end when she would call and leave a message, Frank would re-record the message and answer her allegations and then call and play them back to her. (R., Vol. 8, p. 83-85)

The Defense presented other witnesses regarding Susan Charles' harassment of Frank Lewis.

After arguments of counsel, the jury returned a guilty verdict. A further punishment hearing was held and the jury returned a sentence of ten (10) years in the institutional division of the Texas Department of Corrections and a $10,000.00 fine.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. This Honorable Court should grant certiorari because this case involves an important interpretation of Fifth Amendment double jeopardy law. Under *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) greater and lesser included offenses are treated as the same for double jeopardy purposes. The Texas Appellate Courts found that since the statutory elements of the allegations in the indictment are different, the Petitioner Mr. Lewis could twice be tried and punished for the exact same conduct. The State used the same conduct, an attempt to place telephone calls to Susan Charles but which calls went to a third party who had her old phone number, to prosecute Mr. Lewis for telephone harassment of Mr. Reed and when the police played a recording of the same telephone call to Ms. Susan Charles, to then prosecute him for the same call as stalking. It is uncontested that this is the same call meant to be directed to Susan Charles but which was received by Mr. Read. The State was required under the stalking statute to prove more than one act in a common scheme or course of conduct to prove stalking. The Texas Second Court of Appeals has decided that under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), if one element or claim is different, then there is no double jeopardy, ignoring the State's own jurisprudence and that of this Court in *Harris v. Oklahoma*, 433 U.S. 682. The Texas Court of Criminal Appeals holds that a crime is a lesser included offense if proof of the lesser offense is included within the proof necessary to establish the offense. *Loftin v. State*, 45 S.W.3d 649 at 651 (Tex.Crim.App. 2001) The harassment statute and the stalking statute are neighbors in the Penal

Code and seek to punish the same harm. The fact that the exact same conduct to the letter was used to obtain an harassment conviction when Mr. Reed received the call and then to obtain as a matter of the proof the stalking conviction against Susan Charles places Mr. Lewis in jeopardy twice for the same conduct. This Court should review the failure of the Texas Courts properly to apply this Court's case law in the double jeopardy field of jurisprudence.

A second special and important reason for granting the writ is whether the Texas stalking statute is so vague and imprecise as to impinge upon protected First Amendment rights. The statute requires no intent to commit an offense, merely an intent to engage in conduct that the actor knows or reasonably believes the other person will regard as threatening to themselves or a family member. Under this broad language an abortion doctor is guilty of stalking millions of anti-abortionists. The doctor is knowingly engaging in conduct, performing abortions, that he reasonably believes, due to the protests and calls which he receives, will cause another person to fear injury – an abortion to a family member – or death – to the fetus. A newspaper editorial which endorses abortion commits the same offense. Someone marching in support of going to war commits the same offense. There are other examples of how this statute could be abused and could very well, if the prosecution wished to use it, chill free speech and assembly rights. This statute still does not pass constitutional muster and this Court should grant review.

I.

DOES THE PROHIBITION AGAINST DOUBLE JEOPARDY PREVENT THE STATE FROM PROSECUTING THE DEFENDANT A SECOND TIME FOR THE SAME CONDUCT WHEN THE ACT, THE INTENT, AND THE SUBSTANCE OF THE OFFENSE HAD BEEN PREVIOUSLY PROSECUTED IN A LESSER INCLUDED OFFENSE BUT ONLY THE NAME OF THE INJURED PARTY ALLEGED HAD BEEN CHANGED?

The Texas Courts have ignored the fact that the evidence in this case establishes that for one act, with one intent, with one intended recipient Mr. Lewis has been punished twice. The Texas Courts have ignored not only this Court's established law which prohibits the prosecution of both a lesser included offense and the greater offense but its own law which defines a lesser included offense. The highest court of criminal appeals in Texas, the Texas Court of Criminal Appeals, defined a lesser included offense as not only one that is contained within the definition of the greater offense but also if the proof of the lesser offense is included within the proof necessary to establish the greater offense. *Loftin v. State*, 45 S.W.3d 649 at 651 (Tex.Crim.App. 2001) Harassment constitutes a lesser offense of stalking under either definition. The elements of harassment as alleged in the case involving Mr. Reed can be melded into the stalking allegations against Ms. Charles. This is precisely the type of multiple punishments for the same conduct which the Fifth Amendment double jeopardy protections seek to prevent.

A defendant may not twice be placed in jeopardy for the same offense. CONSTITUTION OF THE UNITED STATES, Fifth and Fourteenth Amendments. Prosecution

for a lesser included offense and sentencing on both counts would violate the double jeopardy clause of the Fifth Amendment to the United States Constitution. *United States v. Sperling*, 560 F.2d 1050 (2nd Cir., 1977); *United States v. Smith*, 690 F.2d 748, 694 F.2d 724 (9th Cir., 1982), cert. den., 75 L.Ed.2d 793, 103 S.Ct. 1435 (1983); see also *United States v. Stricklin*, 591 F.2d 1112 (5th Cir., 1979), reh. den., 598 F.2d 620, cert. den., 444 U.S. 963, 62 L.Ed.2d 375, 100 S.Ct. 449 (1979). Double jeopardy protects against multiple punishments for the same offense even when the sentences are to run concurrent if there are additional consequences attached to the offenses such as the $50.00 mandatory special assessment and the lesser included offense of conspiracy under 21 U.S.C. § 846 should be vacated. *United States v. Grubbs*, 829 F.2d 18 (8th Cir., 1987).

In *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the United States Supreme Court held that a finding of criminal contempt for violating court orders barred subsequent criminal prosecution for the **same conduct** under the Double Jeopardy clause. Id. at 696-99, 113 S.Ct. at 2856-57. The *Dixon* rationale applies to the case of Mr. Lewis. While contempt contains different elements of proof than an underlying criminal offense, the same conduct element prevented the subsequent prosecution of the criminal offense under double jeopardy protections. The Fifth Amendment of the United States Constitution provides three separate guarantees: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. In 1993 this Court overruled *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) and

re-adopted for successive prosecutions protection the "same-elements" test set out in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556, 568 (1993) The *Blockburger* test requires inquiry into whether the second offense contains an element not contained in the first; if it does not, double jeopardy bars a successive prosecution. Conversely, if an element of the second offense is not required to prove the first, there is no double jeopardy. The Texas Court of Criminal Appeals adopted the *Blockburger* test in *Phillips v. State*, 787 S.W.2d 391, 393 (Tex.Crim.App. 1990). Conceptually, the state and federal constitutional provisions are identical. *Phillips*, 787 S.W.2d at 393 n. 2. The *Dixon* opinion, however, still utilized the same conduct test. The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This provision is applicable to the states through the Fourteenth Amendment. *See, e.g., Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). The present case with Mr. Lewis implicates the third guarantee as applied in *Dixon*. This Honorable Court should grant review so that the Court can resolve whether the same conduct protections of the Fifth Amendment survive the *Blockburger* test.

II.

IS THE TEXAS STALKING STATUTE SO VAGUE THAT ITS ENFORCEMENT IMPINGES UPON PROTECTED FIRST AMENDMENT RIGHTS?

The Texas stalking statute relies solely on the reaction of the third party to create the offense. This Honorable

Court, and the Texas Court of Criminal Appeals, recognized that the reaction of the person hearing the speech cannot constitutionally be a source of criminal liability. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *Long v. State*, 931 S.W.2d 285, 287 (Tex.Crim.App. 1996) The First Amendment protections severely suffer under this statute. The statute requires no intent to commit an offense, merely an intent to engage in conduct that the actor knows or reasonably believes the other person will regard as threatening to themselves or a family member. Under this broad language an abortion doctor is guilty of stalking millions of anti-abortionists. The doctor is knowingly engaging in conduct, performing abortions, that he reasonably believes, due to the protests and calls which he receives, will cause another person to fear injury – an abortion to a family member – or death – to the fetus. A newspaper editorial which endorses abortion commits the same offense. Someone marching in support of going to war commits the same offense. There are other examples of how this statute could be abused and could very well, if the prosecution wished to use it, chill free speech and assembly rights. Criminal statutes must be sufficiently clear, and certain in order to allow a citizen to know what conduct is prohibited and to protect against unconstitutional infringement of free speech or they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). Where First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling protected expression. Id. If an act implicates First Amendment guarantees, the doctrine of vagueness demands a greater degree of specificity than in other contexts. *Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298-99. A criminal law may be

held facially invalid even though a defendant's conduct may be properly criminalized and, therefore, it may not be unconstitutional as applied to a defendant's conduct. *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). Even if Mr. Lewis' conduct may be properly criminalized, the statute in this case must still fall because of the impact on First Amendment rights. The language of the 1997 statute is unconstitutionally vague. The Texas stalking statute fails to notify a reasonably intelligent person of what conduct may violate the statute. There is no reasonable person standard applied in the first portion of the statute. The statute provides that a person can be convicted for engaging in conduct which "the actor knows or reasonably believes the other person will regard as threatening." This clearly encompasses free speech. Every street corner preacher is guilty of stalking if, knowing his audience will be the same or nearly the same every morning, he or she preaches hellfire and damnation sermons to the sinful lost souls passing his way. The citizen is subject, not to objective conduct but rather to the foibles of a third party. It could also be an offense under the statute for a person knowingly to engage in conduct that would cause a reasonable person to fear bodily injury or death. Tex. Penal Code Ann. § 42.072(a)(3)(A). The only reasonable person standard is in the second prong of the statute. The vagueness problem pervades the statute. A statute, even if clear and precise, is overbroad if in its reach it prohibits constitutionally protected speech or conduct. *Grayned*, 408 U.S. at 114, 92 S.Ct. at 2302; *Rahmani v. State*, 748 S.W.2d 618, 621 (Tex.App. – Houston [1st Dist.] 1988) PDR. ref'd.

The current stalking statute prohibits constitutionally protected conduct of freedom of association and travel. The

current stalking statute specifically prohibits conduct that may be interpreted by a third party as threatening. This is clearly overbroad in its application. Conduct does not lose First Amendment protection merely because the actor intends to annoy the recipient. The statute does not even require that the actor even intend that his or her conduct be perceived as threatening bodily injury or death by the third party. The Texas Court of Criminal Appeals in striking down the first stalking statute in *Long v. State*, 931 S.W.2d 285, 287 (Tex.Crim.App. 1996) suggested that there should be a nexus between the two or more instances of conduct so that the stalker is not denied notice of what is prohibited. The Texas Legislature merely required that the acts of conduct be done in the same scheme or course of conduct. This limits nothing nor did it address the First Amendment concerns. See Tex. Penal Code Ann. § 42.072. This Honorable Court should grant certiorari in order to review the vagueness challenges of the Texas Stalking statute as it impinges upon First Amendment freedoms.

CONCLUSION AND PRAYER

The issues raised in this Application for Writ of Certiorari raise very substantial and important questions of Constitutional law which affect all citizens. This Honorable Court should grant Certiorari to the Texas Second Court of Appeals to resolve these questions. Accordingly, Petitioner Frank Alexander Lewis respectfully prays that the application for certiorari to the Texas Court of Appeals

sitting in Fort Worth, Texas issue herein and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

DANNY D. BURNS
115 North Henderson Street
Fort Worth, Texas 76102-1940
(817) 870-1544, telephone
(817) 870-1589, facsimile
State Bar No. 03443800
Member of the Supreme Court Bar

Attorney for Petitioner Lewis

[LOGO]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-01-120-CR

FRANK ALEXANDER LEWIS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT
OF TARRANT COUNTY

OPINION ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW

Pursuant to rule of appellate procedure 50, we have reconsidered our opinion upon the State's petition for discretionary review. TEX. R. APP. P. 50. We withdraw our June 27, 2002 opinion and judgment and substitute the following.

Appellant Frank Alexander Lewis appeals his conviction and ten-year sentence for stalking. In five points, Appellant complains his conviction violates the double jeopardy clause because the present conviction was based on the same behavior for which he had been previously convicted of telephone harassment involving another victim, the evidence is legally and factually insufficient to support his conviction for stalking, the trial court erred in overruling his objection to testimony about his extraneous

conduct, and the stalking statute is an unconstitutional infringement on his right to freedom of speech. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Susan Charles and Appellant first went out in 1992 and would talk or go to dinner occasionally. Later, the two became more serious and dated for approximately two years. After Appellant became more and more possessive and physically abusive, however, Charles began to avoid him. For the next four years, Appellant called, followed, and harassed Charles relentlessly. Appellant went to her apartment on countless occasions, knocking on the door or windows and yelling at Charles to let him in. Appellant called Charles and her coworkers at work and faxed pornographic materials to Charles' attention at work.

Charles changed her phone number over twenty-five times and kept an unlisted number. She moved frequently and removed her name from her car title, insurance, utilities, and credit cards. However, Appellant would eventually relocate her and would start harassing her again. Appellant constantly left messages on Charles' phone threatening to kill her, threatening her family, or threatening to mail a videotape to her family that he supposedly had of them engaging in sexual intercourse. Charles' tires were slashed on several occasions and her apartment patio was vandalized. Charles filed numerous reports with the Arlington Police Department and had officers closely patrol her apartment complex. Officers arrested Appellant at her apartment complex for public intoxication and officially warned Appellant not to return to that location. Subsequently, Appellant was arrested for criminal trespass for failing to comply with the warning.

Appellant was also prosecuted for telephone harassment after Robert Reed, who was unfortunate enough to have been assigned one of Charles' former telephone numbers, reported Appellant to the police for continuously calling and leaving obscene messages for Charles or threatening Reed himself.

Finally, in July of 2000, as Charles left work, she noticed Appellant following her. Charles used her cell phone to call the police and pulled into a grocery store parking lot. Charles went inside and Appellant waited outside in his car. The police arrived and Appellant fled. After a lengthy high-speed chase, Appellant stopped on a bridge, climbed on top of his car, and acted as though he was going to jump off the bridge. Officers eventually grabbed Appellant and arrested him.

DOUBLE JEOPARDY

Appellant's first point alleges his conviction for stalking violates the double jeopardy provision of the constitution because he was convicted of telephone harassment in 1999 for the same conduct on which his current conviction is partially based. He asserts that telephone harassment is a lesser included offense of stalking. In 1999, Appellant placed several phone calls to a number that formerly belonged to Charles, but had been reassigned to Reed. Appellant left messages threatening both Charles and Reed, and called Reed anonymously numerous times. The instruments charging Appellant with both telephone harassment in 1999, and stalking here, alleged the same conduct as the basis for both offenses.

The double jeopardy clause of the United States Constitution provides that no person shall be subjected to

twice having life or limb in jeopardy for the same offense. U.S. Const. amend. V. Generally, this clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) multiple punishments for the same offense. *United States v. Dixon,* 509 U.S. 688, 695-96, 113 S. Ct. 2849, 2855-56 (1993); *Ex parte Herron,* 790 S.W.2d 623, 624 (Tex. Crim. App. 1990) (op. on reh'g).

When the same act or transaction violates two statutory provisions, the offenses are the same for double jeopardy purposes if one offense contains all the elements of the other; they are different if each offense has a unique element. *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932). The elements contained in the charging instruments, rather than the penal provisions, are controlling in a double jeopardy analysis. *State v. Perez,* 947 S.W.2d 268, 270-71 (Tex. Crim. App. 1997); *Parrish v. State,* 869 S.W.2d 352, 354 (Tex. Crim. App. 1994). An offense is a lesser included offense if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (Vernon 1981). It does not matter if the charged offense can be established on a theory that does not contain the lesser offense; the issue is whether proof of the charged offense, in *this* case, actually included proof of the lesser included offense as defined in article 37.09. *Schweinle v. State,* 915 S.W.2d 17, 18 (Tex. Crim. App. 1996); *Broussard v. State,* 642 S.W.2d 171, 173 (Tex. Crim. App. 1982).

Here, the information in the telephone harassment case in which Reed was the complainant alleged that (1) Appellant made repeated telephone communications anonymously to Reed (2) with the intent to harass, annoy,

alarm, abuse, torment, or embarrass another. In contrast, the indictment for stalking Charles alleged as *one* of six incidents:[1] (1) that Appellant left a telephone message stating that Charles "had better watch out;" (2) that Appellant knew or reasonably believed Charles would regard the message as threatening bodily injury or death; (3) that the message caused Charles to fear bodily injury or death; (4) and would have caused a reasonable person to fear bodily injury or death; and (5) was made pursuant to the same scheme or course of conduct as the other incidents alleged in the indictment.

The elements of telephone harassment alleged in the 1999 information tracked the statutory language in penal code section 42.07(a)(4) and are completely different than the elements of stalking alleged in the indictment here, which tracked the statutory language of penal code section 42.072(a)(1)(A) and (a)(3)(A). TEX. PENAL CODE ANN. §§ 42.07(a)(4), 42.072(a)(1)(A), (a)(3)(A) (Vernon 1997 & Supp. 2002). In prosecuting Appellant for stalking Charles, the State was not required to prove either that Appellant made repeated anonymous telephone communications to Reed or that he did so with the intent to "harass, annoy, alarm, abuse, torment, or embarrass another." Rather, the State had to prove that the telephone call Appellant made wherein he stated that Charles had

[1] The stalking statute requires the State to allege more than one incident of stalking to show a scheme or course of conduct. TEX. PENAL CODE ANN. § 42.072 (Vernon Supp. 2002). Because Appellant's point here, however, complains only of the one incident that arose from the same conduct as did his telephone harassment conviction, we will not set out the other five incidents of stalking alleged in the indictment until later in the opinion.

"better watch out" constituted conduct that a reasonable person would regard as threatening bodily injury and death or that Appellant knew or reasonably believed Charles would regard as threatening bodily injury or death. *See* TEX. PENAL CODE ANN. §§ 42.072(a)(1)(A), (a)(3)(A).

That some of the same evidence proved both offenses does not constitute a double jeopardy violation because Appellant's single act of calling Reed violated two distinct statutes and harmed two distinct victims. The proof in the instant case focused on Appellant's actions toward Charles, not his actions toward Reed. Moreover, the telephone harassment statute required, and the information in the telephone harassment case alleged, that Appellant made *repeated* anonymous calls to Reed. *See* TEX. PENAL CODE ANN. § 42.07(a)(4). However, in Appellant's trial for stalking here, the State presented evidence of only a *single* telephone call placed by Appellant. Therefore, the evidence presented in the stalking trial would not have supported Appellant's conviction for the lesser included offense of telephone harassment. Because the telephone harassment of Reed is not established by proof of the same or less than all the facts required to establish the offense of stalking Charles, telephone harassment is not a lesser included offense of stalking in this case, nor is there a double jeopardy violation. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(1).

We further conclude that the trial court did not otherwise err in allowing the State to introduce evidence of the incident from which Appellant's conviction for telephone harassment arose even though it arose prior to the 2001 amendment to the stalking statute. Contrary to Appellant's argument, in a prosecution for stalking, it is

not error to admit evidence of incidents occurring prior to the date alleged in the charging instrument and prior to the effective date of the statute. *See Clements v. State,* 19 S.W.3d 442, 448 (Tex. App. – Houston [1st Dist.] 2000, no pet.). Accordingly, because Appellant's conviction for stalking did not violate the double jeopardy clause and the court did not err in admitting the prior incident from which Appellant's conviction for telephone harassment arose, we overrule Appellant's first point.

LEGAL AND FACTUAL SUFFICIENCY

In points two and three, Appellant argues the evidence is legally and factually insufficient to support his conviction for stalking. Specifically, Appellant argues that, because Charles would never have heard the telephone message threatening her if Reed had not recorded it and the police had not played the recording for Charles, there is no evidence of a causal connection between the alleged offense and Appellant's acts.

Standard of Review

In reviewing the legal sufficiency of the evidence to support a conviction, we view all the evidence in the light most favorable to the verdict. *Cardenas v. State,* 30 S.W.3d 384, 389-90 (Tex. Crim. App. 2000); *Narvaiz v. State,* 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied,* 507 U.S. 975 (1993). The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State,* 939 S.W.2d 607, 614 (Tex. Crim. App.), *cert. denied*, 522 U.S. 844 (1997). This standard gives full play to the responsibility of the trier of fact

to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

In reviewing the factual sufficiency of the evidence to support a conviction, we are to view all the evidence in a neutral light, favoring neither party. *Johnson v. State,* 23 S.W.3d 1, 7 (Tex. Crim. App. 2000); *Clewis v. State,* 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Evidence is factually insufficient if it is so weak as to be clearly wrong and manifestly unjust or the adverse finding is against the great weight and preponderance of the available evidence. *Johnson,* 23 S.W.3d at 11. Therefore, we must determine whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the verdict, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Id.* In performing this review, we are to give due deference to the fact finder's determinations. *Id.* at 8-9; *Clewis,* 922 S.W.2d at 136. Consequently, we may find the evidence factually insufficient only where necessary to prevent manifest injustice. *Johnson,* 23 S.W.3d at 9, 12; *Cain v. State,* 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

Analysis

Appellant complains of the legal and factual sufficiency of the evidence to support his conviction based on the fact that Charles would not have been placed in fear but for the police's action of playing the taped telephone message for her. He does not complain, however, about the

sufficiency of the evidence to support the other five allegations of stalking contained in the indictment.

In addition to the allegation involving the telephone message left on Reed's answering machine, the indictment alleges: (1) on November 23, 1999, Appellant knocked on Charles' bedroom window, and she looked outside to see him standing on the sidewalk about ten or fifteen feet from her apartment; (2) on June 25, 2000, Appellant left a telephone message for Charles stating, "You're gonna be done, bitch. You're gonna be done"; (3) on July 4, 2000, Appellant left a telephone message for Charles stating, "You fucked up my life, now you have got to be part of it until I die"; (4) on July 4, 2000, Appellant left a phone message saying he would "make things even with [Charles]" and made a reference to "an eye for an eye and a tooth for a tooth"; and (5) on July 6, 2000, Appellant followed Charles in a car. It appears to be Appellant's position that his conviction should be reversed, even if the five incidents are supported by the evidence, so long as the single allegation involving the telephone message on Reed's answering machine is not supported by legally and factually sufficient evidence.

Courts have held, however, that evidence is sufficient to support a conviction, even where it is insufficient to support all the criminal incidents charged, as long as the incidents that are proved are enough to support a verdict that the defendant is guilty of the offense charged. *See, e.g., Cook v. State,* 488 S.W.2d 822, 824 (Tex. Crim. App. 1972) (holding evidence supporting theft of one of four animals charged was sufficient to support conviction); *State v. Weaver,* 945 S.W.2d 334, 335 (Tex.App. – Houston [1st Dist.] 1997) (holding lack of sufficient evidence to support each of thirty-two complaints of theft did not

override other evidence sufficient to support conviction), *aff'd,* 982 S.W.2d 892 (Tex. Crim. App. 1998), *cert. denied,* 528 S.W.2d 830 (1999); *Harrell v. State,* 834 S.W.2d 540, 543 (Tex. App. – Houston [14th Dist.] 1992, pet. ref'd) (holding evidence supported conviction for theft of aggregate amount even though evidence was not sufficient to support theft of each of eighty-three checks charged stolen). Here, even if we agreed with Appellant's contention regarding the telephone message the police played for Charles, the record establishes the evidence was both legally and factually sufficient to support the jury's verdict based on the other five incidents of stalking alleged in the indictment.

The November 23, 1999 Telephone Message

First, Officer Jason Vire with the Arlington Police Department testified he got a call on November 23, 1999 that a woman had called reporting a prowler around 3:34 a.m. Charles told the dispatcher that the prowler was Appellant and that he would be driving either an older model brown Cadillac or a four-door white Chevrolet Astro van. Vire testified that he spoke to Charles, who was angry and fearful, but that he and the other officers who helped investigate could not find Appellant or his car on or around the premises.

Charles testified that Appellant had awakened her around 3:30 a.m. the night of November 23, 1999 by knocking on her bedroom window. She looked out of her blinds and saw Appellant standing on the sidewalk near the edge of her patio with his hands up in the air. She closed the blinds and called 911. After this incident, Charles testified, she was afraid and continued receiving

phone calls from Appellant, so she moved in with friends. A few days thereafter, Charles further testified, she was evicted from her apartment because someone had put pictures up around her apartment complex of a woman that looked like her having sexual intercourse with several men. Written on the pictures were her full name, telephone number, apartment number, and a description of her car.

The June 25, 2000, and July 4 and 6, 2000 Telephone Messages

Officer Peggy Carr, of the Grand Prairie Police Department, testified that on June 23, 2000, Charles came into the police station appearing scared, fearful, and nervous. Charles complained that Appellant was stalking and harassing her by telephone. Officer Mark Taddonio was assigned to investigate Charles' complaints. On June 29, 2000, Taddonio met with Charles at the police station so that she could submit a formal, written statement and turn in recorded voice mail messages from Appellant as evidence. After listening to the messages, Taddonio prepared a probable cause warrant for Appellant's arrest. Taddonio also set up surveillance at Appellant's place of employment and at an address that he had been known to frequent. While watching the house at which Appellant had been seen in the past, Taddonio took pictures of cars in the driveway, one of which was a cream-colored Lincoln that was missing a license plate on the front.

Charles testified to the contents of the tapes she gave Taddonio. In one of the messages, Appellant told Charles that it was Christmas time, that there was an office just like hers in Oklahoma where he lived, and that he wanted

her to move to Oklahoma with him. In other messages, Appellant mentioned her father and told her he knew both of her sisters' children and how old they were. She testified that she had rarely, if ever, discussed her sisters' children with Appellant and had no idea how he knew their ages. Charles perceived these messages as threatening to her and to her family.

Charles further testified to contents of other tape-recorded messages that Appellant had left in which he would take recordings of her voice and dub in his own voice responding to her. Appellant would add comments while he was playing the tape recordings of Charles' voice and his own voice. In one of these tapes, Appellant told Charles, "You're going to be done, bitch." Charles testified that she was scared Appellant was "going to come after me" or was going to "[e]ither kill me or as he told me he was going to do, chain me to a mobile home on his land west of the metroplex." Charles stated Appellant told her if he chained her up no one would be able to find her. Appellant told her he would chain her up to teach her a lesson about what a woman was supposed to do, which was to stay at home, cook, and clean. Charles said such comments made her feel, "scared [and] sick," and she believed Appellant had the ability to follow through with his threats.

Charles next testified to another message Appellant had left at her office in which he told her she had messed up his life and was going to have to spend the rest of her life with him. Charles testified the message scared her because she "thought he was going to do what he was saying he was going to do," which was to hurt her or to kill her. As July approached, Charles testified she was afraid Appellant might start following her as he had done in the

past, "[b]ecause he always found me and he was telling me that he was going to."

The July 6, 2000 Incident

Charles stated that Appellant had left her a message in July stating the time she had left her office and describing a black and white polka dotted dress she was wearing that day. He also mentioned "Hemphill," which was a road Charles crossed on her way home. Charles was in the habit of taking numerous exits off of the highway and getting back on the highway, or going through residential areas to be certain Appellant was not following her.

On July 6, 2000, as Appellant took her usual twists and turns going home, she noticed a champagne-colored Lincoln Town Car with no front license plate following behind her. She was afraid it was Appellant because Taddonio had called and described a cream-colored Lincoln with no front license plate that was in front of the home at the address he had under surveillance. Charles cut across three lanes of traffic to take the next available exit and the Lincoln followed her. Charles sped at sixty-five miles an hour down Hulen Street in Fort Worth until she saw a grocery store, but the car kept following. Charles then cut across two lanes of traffic and got in the turn lane at a red light to turn left. The Lincoln pulled directly behind her, and in her rearview mirror she could see that Appellant was the driver. After Charles turned left and then turned into a grocery store parking lot, she went inside and called the police and Appellant was arrested.

In light of this uncontroverted evidence from the record, the evidence is both legally and factually sufficient to sustain the jury's verdict that Appellant is guilty of the

offense of stalking, even if there is no causal connection between the telephone message Appellant left on Reed's machine and Charles' injuries. Because the evidence of the five other incidents clearly supports the jury's guilty verdict, we need not decide whether the evidence of Appellant's phone call to Reed is legally and factually sufficient to sustain the jury's guilty verdict. We overrule Appellant's second and third points.

EXTRANEOUS CONDUCT

Appellant's fourth point alleges the trial court erred by overruling his objection to the admission of evidence of his extraneous conduct that was not alleged in the indictment. Specifically, Appellant argues that Charles' testimony about harassing phone calls and other acts committed by Appellant in 1993, 1994, and 1995 constituted an ex post facto violation of Appellant's rights because the stalking statute was not in effect at that time. Appellant claims that, although he failed to object to Charles' testimony about Appellant's conduct in 1993, 1994, and 1995, he requested and was given a running objection to all testimony regarding acts that took place prior to the time the stalking statute was enacted.

We disagree. An objection preserves only the specific ground cited. TEX. R. APP. P. 33.1(a)(1)(A); *Mosley v. State,* 983 S.W.2d 249, 265 (Tex. Crim. App. 1998) (op. on reh'g), *cert. denied,* 526 U.S. 1070 (1999); *Butler v. State,* 872 S.W.2d 227, 237 (Tex. Crim. App. 1994), *cert. denied,* 513 U.S. 1157 (1995); *see also Fierro v. State,* 706 S.W.2d 310, 317-18 (Tex. Crim. App. 1986), *cert. denied,* 521 U.S. 1122 (1997) (a general objection is not sufficient to apprise trial court of complaint urged and thus preserves nothing for

review). Appellant obtained a running objection after he objected to the State's opening argument that mentioned telephone calls Appellant made to Reed in 1999. At no time in the record of this trial, however, whether via a running objection or otherwise, did Appellant object to Charles' testimony about extraneous acts Appellant committed in 1993, 1994, and 1995. We overrule Appellant's fourth point because he has failed to preserve error. TEX. R. APP. P. 33.1(a)(1)(A).

CONSTITUTIONALITY OF THE STATUTE

In his fifth point, Appellant complains that the stalking statute, on its face, presents an unconstitutional infringement on the right to free speech because it is overbroad and too vague. A statute is overbroad if, in addition to proscribing activities that may be constitutionally forbidden, it sweeps within its coverage conduct that is constitutionally protected. *Clark v. State,* 665 S.W.2d 476, 482 (Tex. Crim. App. 1984). A statute is vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972).

When reviewing the constitutionality of a statute, we presume the statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting the statute. *Ex parte Granviel,* 561 S.W.2d 503, 511 (Tex. Crim. App. 1978). The burden rests on the party challenging the statute to establish its unconstitutionality. *Cotton v. State,* 686 S.W.2d 140, 145 (Tex. Crim. App. 1985); *Ex parte Granviel,* 561 S.W.2d at 511. We uphold the statute if we can determine a reasonable construction that will

render it constitutional and carry out the legislative intent. *See Ely v. State,* 582 S.W.2d 416, 419 (Tex. Crim. App. 1979).

We follow our recent holding in *Sisk v. State,* 74 S.W.3d 893 (Tex. App. – Fort Worth 2002, no pet.), as well as the holdings of our sister courts, in concluding that the current version of the stalking statute is not unconstitutional. *See Battles v. State,* 45 S.W.3d 694, 702-03 (Tex. App. – Tyler 2001, no pet.); *Clements v. State,* 19 S.W.3d 442, 451 (Tex. App. – Houston [1st Dist.] 2000, no pet.). First, the statute is not unconstitutional because it prohibits conduct that causes another person to be placed in fear of bodily injury or death. *Clements,* 19 S.W.3d at 451. Conduct enjoys no first amendment protection when the actor intends to place the recipient in fear of bodily injury or death. *See Long v. State,* 931 S.W.2d 285, 290 (Tex. Crim. App. 1996); *Webb v. State,* 991 S.W.2d 408, 415 (Tex. App. – Houston [1st Dist.] 1999 pet. ref'd). Second, the statute states that one can be guilty of stalking by engaging in conduct that he *knows* or reasonably *believes* will be regarded as threatening bodily injury or death. TEX. PENAL CODE ANN. § 42.072(a)(1). A person who knows or reasonably believes his conduct will be regarded as threatening bodily injury or death is necessarily on notice that his conduct is prohibited. *Clements,* 19 S.W.3d at 450. Accordingly, it cannot be said that the statute sweeps within its coverage conduct that is constitutionally protected or that the statute fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. We overrule Appellant's fifth point.

CONCLUSION

Having overruled all of Appellant's points, we affirm the trial court's judgment.

/s/ Dixon W. Holman
DIXON W. HOLMAN
JUSTICE

PANEL B: LIVINGSTON, DAUPHINOT, and HOLMAN, JJ.

DAUPHINOT, J. filed a dissenting opinion

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DISSENTING OPINION ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW

The majority holds that the telephone harassment offense for which Appellant was previously convicted is not a lesser included offense of stalking. I must respectfully dissent to this holding. Telephone harassment, under the facts of this case, is a lesser included offense of stalking because, as charged in the indictment, it is included within the proof necessary to establish the stalking offense.[1]

Section 42.07 of the Texas Penal Code provides in pertinent part:

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[1] *See Lofton v. State*, 45 S.W.3d 649, 651 (Tex. Crim. App. 2001).

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> . . .
>
> (2) threatens, by telephone, in writing, or by electronic communication, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of his family or household, or his property; [or]
>
> . . .
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[2]

Appellant placed threatening calls on or about December 18, 1999. Although he intended the calls for Susan Charles, Robert Reed received them. Appellant was convicted of telephone harassment of Reed, although Charles was his intended victim. It is undisputed that the indictment in the case relies in part on the calls Reed received. The majority points out, "The instruments charging Appellant with both telephone harassment in 1999, and stalking here, alleged *the same conduct as the basis for both offenses.*" (Emphasis added).

The State argues, and the majority holds, that because the misdemeanor information charging Appellant

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[2] TEX. PENAL CODE ANN. § 42.07(a) (Vernon Supp. 2002).

with telephone harassment of Reed alleged an offense under section 42.07(a)(4), while the stalking indictment charged an offense under sections 42.072(a)(1)(A) and (a)(3)(A) of the Texas Penal Code, the elements are completely different.[3] The majority maintains that because the two charging instruments name different complainants, allege a different number of telephone calls (repeated versus one), and differ in the intent elements charged, that the common telephone call and message used to satisfy the conduct element for both the harassment and stalking offenses do not make harassment a lesser included offense of stalking. Respectfully, I cannot agree.

The harassment information alleges that Appellant, "on or about the 18th day of DECEMBER 1999, did THEN AND THERE INTENTIONALLY, WITH INTENT TO HARASS, ANNOY, ALARM, ABUSE, TORMENT OR EMBARRASS ANOTHER, MAKE REPEATED TELEPHONE COMMUNICATIONS ANONYMOUSLY TO ROBERT REED." The stalking indictment alleges that on the same date, Appellant did

> KNOWINGLY ENGAGE IN CONDUCT, TO WIT: TELEPHONED AND LEFT A RECORDED MESSAGE FOR SUSAN CHARLES . . . THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES

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[3] TEX. PENAL CODE ANN. §§ 42.07(a)(4), 42.072(a)(1)(A), (a)(3)(A) (Vernon 1997 & Supp. 2002).

> AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH, AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF. . . .

The telephone harassment statute provides four different ways a person commits that offense.[4] The legislature did not create four different offenses by describing multiple ways of committing telephone harassment. In the case before us, the misdemeanor information charging harassment describes a violation of section 42.07(a)(4), as the majority points out. The stalking allegation, however, describes the same act in terms of section 42.07(a)(2), a different manner and means of committing harassment. Allegation of a different manner and means of committing the same offense does not constitute allegation of a different offense.[5] The harassment information and the stalking indictment allege the same December 18th offense, not two separate offenses. The fact that the State pled a different manner and means of committing harassment in the stalking indictment does not mean it pled a new offense.[6] Analogously, if a defendant were charged and convicted under the "normal use" prong for driving while intoxicated (DWI), he could not subsequently be tried

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[4] *See* TEX. PENAL CODE ANN. § 42.07(a).

[5] *See Price v. State*, 59 S.W.3d 297, 303 (Tex. App. – Fort Worth 2001, pet. ref'd) (holding definition of "intoxicated" in the DWI statute sets forth alternative means of committing one offense and does not set forth separate and distinct offenses).

[6] *Id.*

under the breath or blood alcohol concentration (BAC) prong for the same act.[7]

The harassment, as charged in the information, is a lesser included offense of harassment as charged in the stalking indictment. This fact is yet another reason that prosecution of Appellant under the stalking indictment is jeopardy barred. When Appellant committed harassment against Reed, he was attempting to commit the offense against Charles. The State argues that the December 18th offense is actually two separate offenses, although only a single act, because the harassment information names Reed as the complainant while the stalking indictment names Charles. When Appellant made the calls intended for Charles but received by Reed, his intent was to harass Charles. He had no way of knowing that Reed, not Charles, would receive the calls. That is, Appellant attempted to commit the harassment offense against Charles when he committed the offense against Reed.

Texas Code of Criminal Procedure article 37.09 provides:

> An offense is a lesser included offense if:
>
> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of

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[7] *See id.*; *see also* TEX. PENAL CODE ANN. §§ 49.01(2), 49.04(a) (Vernon Supp. 2002).

> injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an *attempt* to commit the offense charged or an otherwise included offense.[8]

The double jeopardy clause bars the State from putting a person in jeopardy twice for the same offense.[9] "For double jeopardy purposes, '[t]he same offense means the identical criminal act, not the same offense by name.'"[10] If an offense is a lesser included offense of the other, then the two offenses are also the "same" for double jeopardy purposes.[11] A defendant may not be tried for the same offense in multiple prosecutions even though the State alleges a different manner and means of committing that offense.[12]

Not only does the fact that Appellant managed to commit the intended offense against the wrong person make him guilty of the lesser included attempt as described by

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[8] TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981) (emphasis added).

[9] U.S. CONST. amends. V, XIV.

[10] *Ex parte Goodbread*, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998) (quoting *Luna v. State*, 493 S.W.2d 854, 855 (Tex. Crim. App. 1973)).

[11] *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App.1994); *Ex parte Granger*, 850 S.W.2d 513, 516 (Tex. Crim. App. 1993).

[12] *Monge v. California*, 524 U.S. 721, 727-28, 118 S. Ct. 2246, 2250 (1998); *Nickerson v. State*, 69 S.W.3d 661, 670 (Tex. App. – Waco 2002, pet. ref'd).

article 37.09, his error implicates the transferred intent provisions of Texas Penal Code section 6.04(b). That section provides:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
>
> (1) a different offense was committed; or
>
> (2) a different person or property was injured, harmed, or otherwise affected.[13]

Whether Appellant was convicted under a theory of transferred intent or whether the harassment offense is read in such a way that it does not require that the person actually injured be the person the actor intended to injure, Charles was the intended victim. While Appellant's act was an offense against Reed, it was, at the same time, an attempted harassment of Charles. Under article 37.09(4), the attempt is included in the completed offense, even if the victims are not the same person.[14] Similarly, evidence of a single telephone call is a lesser included element of the offense of harassment.[15]

Appellant was convicted of the December 18, 1999 telephone harassment, and further prosecution for that offense, even as a lesser included element of a greater offense, is jeopardy barred. I would so hold.

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[13] TEX. PENAL CODE ANN. § 6.04(b) (Vernon 1994).

[14] TEX. CODE CRIM. PROC. ANN. art. 37.09(4).

[15] *See* TEX. PENAL CODE ANN. § 42.07(a).

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PUBLISH

SEP 09 2002

(LOGO)

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-01-120-CR

Frank Alexander Lewis	§	From the 297th District Court
	§	of Tarrant County (0774991D)
	§	September 9, 2002
v.	§	Opinion by Justice Holman
	§	Dissent by Justice Dauphinot
The State of Texas	§	(p)

JUDGMENT

After reviewing the State's petition for discretionary review, we modify our opinion and judgment in this appeal. *See* TEX. R. APP. P. 50. We withdraw our June 27, 2002 opinion and judgment and substitute the following.

This court has again considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

/s/ Dixon Holman

CASE NO. 0774991D

THE STATE OF TEXAS	§	IN THE 297TH DISTRICT
VS.	§	
FRANK ALEXANDER LEWIS	§	COURT OF
	§	TARRANT COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED

Judge Presiding :	HON. EVERETT YOUNG	Date of Judgment :	FEBRUARY 1, 2001
Attorney for State District Attorney :	TIM CURRY	Assistant District Attorney :	FRED L. CUMMINGS REBECCA DENHAM
Attorney for Defendant :	DANNY D. BURNS	Charging Instrument :	INDICTMENT

Offense Date	Convicted Offense	
NOVEMBER 23, 1999	STALKING AND A PRIOR CONVICTION	
Degree	**Count**	**Plea**
3RD	ONE	NOT GUILTY

Findings on Deadly Weapon : NONE

Plea to Enhancement Paragraph(s)	: NONE			
Plea to Habitual Paragraph(s)	: NONE			
Findings on Enhancement/ Habitual Paragraph(s)	: NONE			
Jury Verdict	: GUILTY			
Punishment Assessed By	: JURY			
Date Sentence Imposed	: FEBRUARY 2, 2001	Date to Commence	:	FEBRUARY 2, 2001
Punishment Place of Confinement	: COUNT ONE-TEN (10) YEARS INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE			
Fine	: $10,000.00 TEN THOUSAND DOLLARS AND ZERO CENTS			
Time Credited	: 212 DAYS	Court Costs	:	$272.25
Reparation:	NONE	Restitution	:	NONE

On this day, set forth above, this cause came for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also being present, or, where a Defendant is not represented by counsel, that the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial and thereupon a jury, to-wit, the above named foreman and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into Court by the proper officer, the Defendant and Defendant's counsel being present, and returned into open court the verdict set forth above, which was received by the Court, and is here now entered upon the minutes of the Court as shown above.

Thereupon, the Defendant elected to have punishment assessed by the above shown assessor of punishment, and when shown above that the indictment contains enhancement paragraph(s), which were not waived, and alleges Defendant to have been convicted previously of any felony or offenses for the purpose of enhancement of punishment, then the Court asked Defendant if such allegations were true or false and Defendant answered as shown above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the

question of punishment and having been duly charged by the Court, they retired to consider such question, and after having deliberated, they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed the punishment of the Defendant as shown above.

IT IS THEREFORE CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as set forth above, and said Defendant be punished in accordance with the Jury Verdict or the Court's Finding, as shown above and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Institutional Division of the Texas Department of Criminal Justice, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary.

And, if shown above that the Defendant has been duly and legally convicted of a prior offense by showing the court, cause number, and offense, together with the punishment for such offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is further ORDERED AND ADJUDGED that the punishment herein adjudged against said Defendant

shall begin when the judgment in such prior offense, when shown above, shall have ceased to operate.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

/s/ Everett Young
PRESIDING JUDGE

Date Signed : FEBRUARY 6, 2001

Notice of Appeal : _____

Mandate Received : _____

NAME FRANK ALEXANDER LEWIS	OFFENSE STALKING- ENHANCEMENT
ADDRESS 12832 STAFFORD OKLAHOMA CITY OK 73120	DATE 11-23-99
RACE W SEX M AGE 48 DOB 09-11-52	I. P. SUSAN CHARLES
CASE NO. 0774991	C. C.
FILED: (DATE) 07-17-00	AGENCY ARLINGTON PD
PC HAS BEEN DETERMINED TRANSFER COURT DATE 0175029	OFFENSE NO. 99901B032
	COURT D297

INDICTMENT NO. 0774991D

(Filed Sep. 25, 2000)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS OF TARRANT COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Tarrant County, in the State of Texas, upon their oaths do present in and to the * * * *

CRIMINAL DISTRICT COURT NO. 3 of said County that * * *

FRANK ALEXANDER LEWIS hereinafter called Defendant, in the County of Tarrant and State aforesaid, on or about the 23RD day of NOVEMBER 1999, did

THEN AND THERE KNOWINGLY ENGAGE IN CONDUCT, TO-WIT: KNOCKED ON THE BEDROOM WINDOW OF SUSAN CHARLES AND STOOD ON THE

SIDEWALK A SHORT DISTANCE FROM SAID BEDROOM WINDOW AND LOOKED AT SUSAN CHARLES AND SHRUGGED HIS SHOULDERS WHEN SUSAN CHARLES LOOKED AT THE SAID DEFENDANT, THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND THE DEFENDANT DID ON OR ABOUT THE 18TH DAY OF DECEMBER, 1999, IN TARRANT COUNTY, TEXAS, KNOWINGLY ENGAGE IN CONDUCT, TO WIT: TELEPHONED AND LEFT A RECORDED MESSAGE FOR SUSAN CHARLES IN WHICH HE SAID SEVERAL TIMES THAT SUSAN CHARLES "HAD BETTER WATCH OUT", THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH, AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND ALL OF THE ABOVE CONDUCT OCCURRED ON MORE THAN ONE OCCASION AND WAS PURSUANT TO THE SAME SCHEME OR COURSE OF CONDUCT,

COUNT ONE PARAGRAPH TWO
AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID FRANK ALEXANDER LEWIS IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE 25TH DAY OF JUNE, 2000, DID THEN AND THERE KNOWINGLY ENGAGE IN CONDUCT, TO-WIT: LEFT A TELEPHONE MESSAGE WHERE THE SAID DEFENDANT TOLD SUSAN CHARLES "YOU'RE GONNA BE DONE, BITCH, YOU'RE GONNA BE DONE, BITCH", THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND THE DEFENDANT DID ON OR ABOUT THE 4TH DAY OF JULY, 2000, IN TARRANT COUNTY, TEXAS, KNOWINGLY ENGAGE IN CONDUCT, TO-WIT: LEFT A TELEPHONE MESSAGE WHERE THE SAID DEFENDANT TOLD SUSAN CHARLES "YOU FUCKED UP MY LIFE, NOW YOU HAVE GOT TO BE PART OF IT UNTIL I DIE", THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO

BE PLACED IN FEAR OF BODILY INJURY OR DEATH, AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND ALL OF THE ABOVE CONDUCT OCCURRED ON MORE THAN ONE OCCASION AND WAS PURSUANT TO THE SAME SCHEME OR COURSE OF CONDUCT,

COUNT ONE PARAGRAPH THREE
AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID FRANK ALEXANDER LEWIS IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE 4TH DAY OF JULY, 2000, DID THEN AND THERE KNOWINGLY ENGAGE IN CONDUCT, TO-WIT: LEFT A TELEPHONE MESSAGE WHERE THE SAID DEFENDANT TOLD SUSAN CHARLES HE WOULD MAKE THINGS EVEN WITH HER WITH A REFERENCE TO AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH, THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND THE DEFENDANT DID ON OR ABOUT THE 6TH DAY OF JULY, 2000, IN TARRANT COUNTY, TEXAS, KNOWINGLY ENGAGE IN CONDUCT, TO-WIT: FOLLOWING SUSAN CHARLES IN AN AUTOMOBILE, THAT WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT

WAS DIRECTED SPECIFICALLY AT ANOTHER, NAMELY, SUSAN CHARLES, THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE SAID SUSAN CHARLES WOULD REGARD AS THREATENING BODILY INJURY OR DEATH FOR SUSAN CHARLES AND SAID CONDUCT CAUSED SUSAN CHARLES TO BE PLACED IN FEAR OF BODILY INJURY OR DEATH, AND SAID CONDUCT WOULD CAUSE A REASONABLE PERSON TO FEAR BODILY INJURY OR DEATH FOR HIMSELF, AND ALL OF THE ABOVE CONDUCT OCCURRED ON MORE THAN ONE OCCASION AND WAS PURSUANT TO THE SAME SCHEME OR COURSE OF CONDUCT,

AND IT IS FURTHER PRESENTED TO SAID COURT THAT PRIOR TO THE COMMISSION OF THE OFFENSE SET OUT ABOVE THE DEFENDANT HAD BEEN FINALLY CONVICTED OF A STALKING OFFENSE, TO-WIT: ON THE 3RD DAY OF JUNE, 1999, IN THE COUNTY CRIMINAL COURT NUMBER FIVE OF TARRANT COUNTY, TEXAS, IN CAUSE NUMBER 0676210.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Tim Curry /s/ J.D. Shipp

Criminal District Attorney Foreman of the Grand Jury

INDICTMENT – ORIGINAL

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

February 12, 2003
COA#: 02-01-00120-CR
RE: Case No. 1799-02
STYLE: LEWIS, FRANK ALEXANDER

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

DANNY D BURNS
115 N HENDERSON STREET
FT WORTH TX 76102-1940